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5150 ECR LOS ALTOS, LLC

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In re

5150 ECR GROUP LLC,

Debtor.

Case No. 21-51196 SLJ

Chapter 11

**MOTION TO DISMISS CHAPTER 11
CASE, OR, IN THE ALTERNATIVE,
EXCUSE RECEIVER FROM
TURNOVER REQUIREMENTS OF 11
U.S.C. § 543**

Date: TBD¹

Time: TBD

Place: Via Video or Teleconference²
United States Bankruptcy Court
280 South First Street
Courtroom 9
San Jose, California 95113

¹ Secured Creditor has filed an Ex Parte Application for an order shortening time on the hearing on this Motion. Secured Creditor will serve and provide notice of the hearing consistent with the Court's ruling on its Ex Parte Application.

² See Judge Johnson's posted calendar for this hearing at www.canb.uscourts.gov for information on how to attend via video or teleconference.

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MOTION TO DISMISS CHAPTER 11 CASE, OR, IN THE ALTERNATIVE,

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1 **TO DEBTOR 5150 ECR GROUP LLC AND ITS COUNSEL:**

2 Secured Creditor 5150 ECR Los Altos, LLC (“Secured Creditor”) hereby moves for entry
3 of an order dismissing the captioned chapter 11 case for cause pursuant to 11 U.S.C. § 1112(b),
4 with a 180-day bar from refiling, or, if the Court is not prepared to dismiss this case immediately,
5 entry of an order under section 11 U.S.C. § 543(d) maintaining Kevin Singer (“Receiver”) as the
6 duly appointed receiver in the pending Santa Clara Superior Court action entitled 5150 ECR Los
7 Altos, LLC v. 5150 ECR Group LLC, Case No. 21CV378563 (“Receivership Action”), and
8 excusing the Receiver from the turnover requirements of section 543. In support of this requested
9 relief, Secured Creditor respectfully submits as follows:

10 **I. INTRODUCTION**

11 Debtor 5150 ECR Group LLC (“Debtor”) owns commercial real property commonly
12 known as 5150 El Camino Real, Los Altos, California (“Property”). Secured Creditor holds a
13 perfected, first priority lien on the Property and related personal property securing a loan in the
14 original principal amount of \$41,000,000. On April 27, 2021, based upon the Debtor’s multiple
15 monetary and nonmonetary defaults under the subject loan documents, Santa Clara County
16 Superior Court (“State Court”) entered an order (“Receivership Order”) appointing the Receiver
17 to take possession of and administer the Property.

18 On September 9, 2021, after months of diligent work by the Receiver and his professionals,
19 the State Court entered an order authorizing and confirming the Receiver’s sale of the Property to
20 Secured Creditor for \$48,000,000. This order provides that the sale of the Property is cancelled if
21 the sale does not close within 10 days, i.e., by September 19, 2021. On September 14, 2021, in a
22 flagrant attempt to derail the court-approved sale just before its consummation – as well as a
23 trailing trustee’s sale of the Property scheduled for September 29 – the Debtor filed a skeleton
24 petition commencing the instant chapter 11 case.

25 For reasons discussed below, the Court should dismiss this case for cause under section
26 1112(b). The individual who signed the Debtor’s petition, Vahe Tashjian, lacked authority to sign
27 on behalf of either the Debtor or its manager. Separate and independent from the lack of authority
28 to file this case – which is fatal in and of itself – the case should be dismissed with a 180-day bar

1 to refiling because the petition was filed in bad faith. If, however, the Court does not immediately
2 dismiss this case, then Secured Creditor requests that the Court enter an order under section 543(d)
3 (i) authorizing the Receiver to remain in custody and control of the Property and all related
4 personal property, and otherwise retain all powers and duties set forth in the Receivership Order,
5 and (ii) excusing the Receiver from complying with the requirements of section 543.

6 **II. FACTUAL BACKGROUND**

7 **A. The Loan Secured by the Property.**

8 The Debtor owns the Property, a 78,950 square foot commercial property. Secured
9 Creditor is the holder of a promissory note ("Note") made by the Debtor in the original principal
10 amount of \$41,000,000. See Declaration of Pat Calihan ("Calihan Decl."), filed herewith, **Exhibit**
11 **A**. The Note is secured by, inter alia, a first priority deed of trust on the Property ("Deed of Trust").
12 Calihan Decl., **Exhibits B – E**. A copy of the Loan Agreement is attached as **Exhibit F** to the
13 Calihan Decl.

14 **B. The Debtor's Multiple Uncured Loan Defaults and Trustee's Sale**

15 The Debtor defaulted under the terms of the Note, Deed of Trust, Loan Agreement and
16 other loan documents by, among other things: (i) failing make installment payments due in
17 February 2021 and thereafter; (ii) failing to replenish the Carry Reserve Subaccount, as defined in
18 the Loan Agreement; (iii) failing to pay the loan off on or before the maturity date of May 9, 2021;
19 and (iv) allowing the Property to be encumbered with unpermitted liens in the amounts of a
20 \$180,000 and \$132,110.51 See Ex Parte Application for (1) Appointment of a Receiver, (2)
21 Temporary Restraining Order , and (3) Order to Show Cause Re Preliminary Injunction and
22 Appointment of Receiver ("Receiver Application") at p. 6, attached as **Exhibit 1** to the Request
23 for Judicial Notice in support of this Motion ("RJN"), filed herewith, and the Declaration of Steven
24 Graines in support of the Receiver Application at p. 7, attached as **Exhibit 2** to the RJN. See also,
25 Calihan Decl., ¶ 10.

26 To date, the unpaid principal balance due and owing by the Debtor under the Note and
27 other loan documents is \$41,000,000. Through September 8, 2021, the total amount due to Secured
28 Creditor was \$46,018,138.58. Additional amounts continue to accrue, including, among other

1 things, non-default rate interest, default interest, legal, administrative and other fees and costs.

2 On March 18, 2021, Secured Creditor caused a Notice of Default to be recorded against
3 the Property due to the Debtor's defaults under the loan. Calihan Decl., **Exhibit G**. A trustee's
4 sale of the Property was originally scheduled for July 21, 2021. In connection with the Receiver's
5 sale process, the trustee's sale was postponed to September 29, 2021.

6 **C. Appointment of State Court Receiver**

7 In March of 2021, a prior holder of the Note filed the Receivership Action, and applied for
8 appointment of a receiver to take possession of and administer the Property. Secured Creditor has
9 substituted into the Receivership Action as plaintiff. The Receiver Application asserted numerous
10 reasons for the appointment of a receiver, including, but not limited to, the fact that the Debtor is
11 unable to sell the Property to pay off the loan and is constrained in its ability to raise funds. RJN,
12 **Exhibit 1** at p. 6.

13 On April 27, 2021, the State Court entered the Receivership Order. RJN, **Exhibit 3**. The
14 Receiver, in turn, took possession of and, since April 2021, has administered the Property in
15 accordance with the terms of the Receivership Order. Since the Receiver's appointment, Secured
16 Creditor and/or its predecessor has funded all expenses of the receivership and the Property.
17 Specifically, Secured Creditor has had to advance all funds needed to pay for (i) the Property's
18 operating expenses and the Receiver's fees and expenses (totaling \$265,731.00), (ii) property
19 insurance (totaling \$20,230.00), and (iii) lease termination fees (totaling \$947,702.90). In total,
20 Secured Creditor has advanced approximately \$1,233,663.90 to date. The Debtor has not
21 contributed anything toward these expenses.

22 **D. Court-Approved Receiver Sale of the Property**

23 With the assistance of his broker, the Receiver spent months marketing the Property for
24 sale and meeting with multiple interested purchasers. See Declaration of Kevin Singer ("Singer
25 Decl."), filed herewith. The "stalking horse" bidder the Receiver ultimately located for the
26 Property, KB Home South Bay, Inc., ended up withdrawing its bid. Secured Creditor was the only
27 qualified bidder at the Sale Hearing, and made the highest bid for the Property in the amount of
28 \$48,000,000. Notably, days before the September 9 sale hearing, the Debtor, through Mr.

1 Tashjian, contacted the Receiver and claimed that the Debtor wanted to participate in the auction.
2 The Debtor, however, was unable to qualify as a bidder, as it could not come up with a deposit of
3 \$1.4 million or show proof of funds in excess of \$48 million.

4 On September 9, 2021, the State Court entered in the Receivership Action an order
5 authorizing and confirming the sale of the Property to Secured Creditor as the highest bidder (“Sale
6 Order”). RJN, **Exhibit 4**. The Sale Order, however, set a September 19 deadline to complete the
7 transaction: “In the event that [Secured Creditor] fails to timely close escrow on or before
8 September 19, 2021, the sale of the Property to Buyer is cancelled without further Court Order,
9 and Escrow involving the sale of the Property to [Secured Creditor] is terminated without further
10 Court Order.” Id. at p. 2.

11 **E. Bankruptcy Filed on Eve of Receiver Sale Closing**

12 On September 14, 2021, as Secured Creditor and the Receiver were preparing to execute a
13 sale agreement for the Property, the Debtor filed a skeleton petition commencing the instant
14 chapter 11 case. See Doc# 1. The filing of the Debtor’s bankruptcy prevented the sale from
15 closing by the September 19 deadline.³

16 The Debtor confirms in the petition that this case is a Single Asset Real Estate as defined
17 in 11 U.S.C. § 101(51B). Id. at p. 2 of 8. To date, the Debtor has not filed schedules, a Statement
18 of Financial Affairs, or various other required documents. See Doc# 4. The creditor matrix lists
19 only seven entities, one of which is Secured Creditor. It is unknown how many entities on the
20 matrix are listed only for notice purposes. On page 6 of the petition, containing the “List of
21 Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders,” the Debtor has stated
22 “NONE.” Secured Creditor has filed a notice of non-consent to the Debtor’s use of its cash
23 collateral. See Doc# 10.

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27 ³ On September 16, 2021, the Receiver filed in the Receivership Action an Ex Parte Application for an order tolling
28 the September 19 closing deadline in the Sale Order on account of the Debtor’s bankruptcy filing. On September 18,
2021, the judge in the Receivership Action signed an order granting this application and staying the September 19
deadline. A true and correct copy of this order is attached as **Exhibit 5** to the RJN.

1 **F. Debtor's and Debtor's Manager's Operating Agreements Both Require**
2 **Consent of All Members in Order for Debtor to File for Bankruptcy.**

3 On page 5 of the petition, under "Declaration and signature of authorized representative of
4 debtor", Mr. Tashjian signed as "manager of 5150 ECR Group Manager, LLC." The Debtor's
5 operating agreement ("Debtor OA") provides that 5150 ECR Group Manager, LLC ("ECR
6 Manager") is the Debtor's manager. See Exhibit A to the Declarations of Farzin Shakib ("Shakib
7 Decl.") and Mark Yazdani ("Yazdani Decl."), filed herewith at section 5.2(a). Mr. Tashjian,
8 however, did not have authority to sign the petition on behalf of either the Debtor or ECR Manager.

9 Under the operating agreements of ECR Manager and the Debtor, the Debtor cannot file
10 for bankruptcy without the unanimous consent of ECR Manager's members and the Debtor's
11 members. That is to say, all members must consent to the Debtors' bankruptcy filing at both the
12 ECR Manager level and Debtor level.

13 Unanimous Consent Required under ECR Manager's Operating Agreement

14 ECR Manager's operating agreement ("ECR Manager OA") provides at section 5.5:

15 **Material Action.** Notwithstanding any other provision of this Agreement and
16 notwithstanding any provision of law that otherwise so empowers the Company,
17 *until the debt evidenced by the first mortgage lien on the Property (the "Debt")*
18 *is repaid in full, neither the Member, any officer or any other person shall be*
19 *authorized or empowered, nor shall they permit the Company to, nor to vote in*
20 *favor of 5150 ECR Group LLC, as borrower, doing for itself, without the prior*
21 *unanimous written consent of the Members and the Independent Manager, take*
22 *any Material Action.* When voting with respect to any of the matters set forth in
23 the immediately preceding sentence of this Section 5.5, the Independent Manager
24 shall consider only the interests of 5150 ECR Group LLC, as borrower, and this
25 Company, as applicable, including its creditors.

26 For purposes of this Section 5.5, "Material Action" means to (i) file or consent to
27 the filing of any petition, either voluntary or involuntary, to take advantage of any
28 applicable insolvency, bankruptcy, liquidation or reorganization statute....

29 See Exhibit B to the Shakib Decl. and Yazdani Decl. (emphasis added).

30 The ECR Manager OA lists two Members, Dutchints Development LLC ("Dutchints") and
31 Pine Investment Group LLC ("Pine Investment"), and one Independent Manager, Julia
32 McCullough. ECR Manager OA at section 1.18 and pp. 17 – 18. Mr. Tashjian is listed as the
33 principal of Dutchints. Under the above language, so long as Secured Creditor's loan is
34 outstanding, no Member, officer or "other person" can take or vote in favor of the Debtor taking a

1 “Material Action,” defined to include filing a bankruptcy petition without the unanimous written
2 consent of the members and independent manager. As described below, one of ECR Manager’s
3 members, Pine Investment expressly withheld its consent to the Debtor filing for bankruptcy.

4 Unanimous Consent Required under Debtor’s Operating Agreement

5 The Debtor’s Operating Agreement (“Debtor OA”) likewise requires the unanimous
6 consent of the Debtor’s members in order for the Debtor to file for bankruptcy. In particular, the
7 Debtor OA provides, “*Notwithstanding any other provisions of [the Operating] Agreement*, the
8 Manager and the [Debtor] shall each conduct their operations as a Special Purpose Bankruptcy
9 Remote Entity and as such shall take all actions necessary to cause the [Debtor] and Manager, to
10 comply with, and will refrain from taking any actions in violation of, the conditions set forth in
11 the defined term ‘Special Purpose Bankruptcy Remote Entity’.” Debtor’s operating agreement
12 (“Debtor OA”) ¶ 5.6(f) (**Exhibit A** to Shakib Decl. and Yazdani Decl.) (emphasis added). The
13 Debtor’s “Manager” is ECR Manager. See Debtor OA at section 5.2(a).

14 The Debtor OA defines the term “Special Purpose Bankruptcy Remote Entity” as a limited
15 liability company “which at all times since its formation and at all times thereafter ... vi) has not,
16 *and without the unanimous consent of all of its partners, directors or members*, the Manager
17 (including its Independent Manager), as applicable, *will not (i) file or consent to the filing of any*
18 *petition, either voluntary or involuntary, to take advantage of any applicable insolvency,*
19 *bankruptcy, liquidation or reorganization statute....” Id.* at p. 11 (emphasis added).

20 Accordingly, the Debtor OA prohibits the Debtor’s Manager, i.e., ECR Manager, from
21 causing the Debtor to file for bankruptcy without the unanimous consent of all the Debtor’s
22 members.⁴

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27 ⁴ Although paragraph 5.1(c) of the Debtor OA (Authority of Manager) prohibits the Manager from filing a bankruptcy
28 petition unless 67% “of the Class A Units or more have consented to the taking of such action[.]” this provision is
overridden by the subsequent paragraph 5.6(f) and its “[n]otwithstanding any other provisions of this [Operating]
Agreement” language.

1 **G. Debtor Did Not Have The Required Unanimous Member Consents When the**
2 **Debtor Filed for Bankruptcy**

3 As set forth in the Shakib Decl. and Yazdani Decl., Pine Investment, one of the Debtor's
4 members – and also one of ECR Manager's members – expressly withheld its consent to the Debtor
5 filing for bankruptcy. In fact, on September 8, 2021, on the evening before the Sale Hearing, upon
6 learning that Mr. Tashjian intended to have the Debtor file for bankruptcy, Mr. Shakib sent Mr.
7 Tashjian an email expressly declining to consent on behalf of himself, Mr. Yazdani and Pine
8 Investment. See Shakib Decl., **Exhibit C**. Mr. Shakib stated in the email that "[t]he filing of a
9 petition in bankruptcy would be in violation of the terms of the operating agreements." Id.
10 (emphasis added)

11 Notably, paragraph 5.6(f) of the Debtor OA provides that for so long as the loan is
12 outstanding, the Debtor's lender "is and shall be an intended third-party beneficiary of the
13 provisions of Section 5.6(f) and any and all other 'Special Purpose Bankruptcy Remote Entity' ...
14 provisions of this [Operating] Agreement (collectively, the 'SPE Provisions') and **Lender may**
15 **enforce such SPE Provisions.**" Id. (emphasis added). Likewise, so long as the loan is outstanding,
16 Secured Creditor is an "intended third party beneficiary" of section 5.5 of the ECR Manager OA
17 and other "special purpose" provisions of that agreement. See ECR Manager OA at § 5.7.

18 **III. DISCUSSION**

19 The Court should dismiss this case for "cause" under section 1112(b) because the Debtor's
20 Manager, ECR Manager, lacked authority to file bankruptcy for the Debtor without the unanimous
21 written consent of ECR Manager's and the Debtor's respective members. This flaw is fatal to this
22 case and justifies dismissal in and of itself. However, as a separate and additional basis for
23 dismissal, the Court should dismiss this case because the filing of the Debtor's petition was a bad
24 faith effort by the Debtor and Mr. Tashjian to derail the court-approved sale of the Property, among
25 several other bad faith criteria described below.

26 In the alternative, if the Court does not dismiss this case immediately (although it should),
27 then Secured Creditor requests that the Court enter an order under section 543(d) (i) authorizing
28 the Receiver to remain in custody and control of the Property and all related personal property,

1 and otherwise retain all powers and duties set forth in the Receivership Order, and (ii) excusing
2 the Receiver from complying with the requirements of section 543.

3 **A. The Court Should Dismiss This Case for “Cause” under Section 1112(b).**

4 Under section 1112(b), a bankruptcy court “shall” convert a chapter 11 case to a case under
5 chapter 7, or dismiss the case, “whichever is in the best interests of creditors and the estate, *for*
6 *cause*, unless the court determines that the appointment ... of a trustee or an examiner is in the
7 best interests of creditors and the estate.” (emphasis added) Section 1112(b) establishes a two-
8 step analysis: “First, it must be determined that there is ‘cause’ to act. Second, once a
9 determination of ‘cause’ has been made, a choice must be made between conversion and dismissal
10 based on the ‘best interests of the creditors and the estate.’” Nelson v. Meyer (In re Nelson), 343
11 B.R. 671, 675 (9th Cir. BAP 2006).

12 Here, dismissal is the appropriate remedy, because the Debtor’s petition was filed without
13 authority in violation of the ECR Manager OA and the Debtor OA. Although the lack of authority
14 justifies immediate dismissal in and of itself, as a separate and additional basis for dismissal, the
15 petition was unquestionably filed in bad faith. The best interests of creditors – including, in
16 particular, Secured Creditor, who is by far the largest (and perhaps only) creditor in this single
17 asset case – are best served by dismissal so that the court-approved sale of the Property can be
18 completed.⁵

- 19 1. The Court should dismiss this case for cause because the Debtor’s manager
20 lacked authority under both the Debtor OA and ECR Manager OA to file
bankruptcy for the Debtor.

21 Section 1112(b)(4) sets out a non-exhaustive list of factors that can constitute “cause.” A
22 bankruptcy court, moreover, “has wide discretion in determining what constitutes cause ... under
23 § 1112(b).” In re Khan, 2012 Bankr. LEXIS 2574, *14 (9th Cir. BAP, June 6, 2012). In this
24 instance, cause exists to dismiss this case because the Debtor’s manager lacked authority to cause
25 the Debtor to file for bankruptcy.

26 “State law determines who has the authority to file a voluntary bankruptcy petition on
27 behalf of a debtor.” Sino Clean Energy, Inc. v. Seiden (In re Sino Clean Energy, Inc.), 901 F.3d

28 ⁵ The Debtor’s list of 20 largest unsecured creditors lists “-NONE-.” See Doc. #1 at p. 6.

1 1139, 1141 (9th Cir. 2018). Here, the Debtor is a California limited liability company. See
2 Operating Agreement at p. 1, 1st Recital.

3 The Ninth Circuit Bankruptcy Appellate Panel recently addressed the issue of whether a
4 manager of a California LLC had authority to file bankruptcy for the LLC. The BAP, citing to the
5 Ninth Circuit's Sino Clean Energy decision, explained:

6 California's Revised Uniform Limited Liability Company Act governing limited
7 liability companies provides that, "[e]xcept as **otherwise provided in this section**,"
8 the operating agreement governs, among other matters, the relations of its members
and the activities of the limited liability company.

9 SSRE Holdings, LLC v. Zirkle Grp., LLC (In re SSRE Holdings, LLC), 2021 Bankr. LEXIS 2346,
10 *9 (9th Cir. BAP, Aug. 26, 2021) (emphasis in original, citing Cal. Corp. Code § 17701.10(a)).

11 While the Cal. Corp. Code sets forth default rules for control of LLCs, "[m]embers of a
12 limited liability company can ... adopt a different rule within an operating agreement." Id., citing
13 Cal. Corp. Code § 17701.10. In SSRE, the BAP ultimately determined that under terms of the
14 debtor's operating agreement, the manager had a "broad, general grant of authority ... that
15 specifically was designated to be without limitation." Id. at *11. Consequently, the operating
16 agreement granted the manager implicit authority to file bankruptcy for the debtor. Id. at *12.

17 Here, there is no provision in the Cal. Corp. Code that overrides the terms of the ECR
18 Manager OA or Debtor OA. Moreover, in stark contrast to the manager in SSRE, the Debtor's
19 Manager did not have a broad, general grant of authority to act on behalf of the Debtor. Rather,
20 the powers of the Debtor's Manager, ECR Manager, are highly restricted with respect to its ability
21 to file bankruptcy for the Debtor. As set forth above, the unanimous consent of both ECR
22 Manager's and the Debtor's respective members are required before there exists the requisite
23 authority for the Debtor to file bankruptcy.

24 The requisite unanimous consent, however, did not exist. Pine Investment, a member of
25 both ECR Manager and the Debtor, through its members Messrs. Yazdani and Shakib, explicitly
26 withheld consent. Thus, the Debtor's Manager, ECR Manager, lacked authority to file bankruptcy
27 for the Debtor whether through Mr. Tashjian or anyone else. The Debtor's filing was improper
28 and invalid, and the Court should dismiss this case for cause.

1 2. As a separate and distinct basis for dismissal, the Court should dismiss this
2 case for cause because the Debtor's petition was filed in bad faith.

3 Courts hold overwhelmingly that “a lack of good faith in filing a Chapter 11 petition
4 establishes cause for dismissal.” Marsch v. Marsch (In re Marsch), 36 F.3d 825, 828 (9th Cir.
5 1994). Bankruptcy courts dismiss cases under section 1112(b) where they are filed for “tactical
6 reasons unrelated to reorganization.” Id. The central inquiry is “whether a debtor is attempting to
7 unreasonably deter and harass creditors or attempting to effect a speedy, efficient reorganization
8 on a feasible basis.” Id. While the statute does not explicitly use the term “bad faith”, “the case
9 law refers to these dismissals as dismissals for ‘bad faith’ filing[.]” Id.

10 In deciding whether a case was filed in bad faith, courts look at a variety of factors,
11 including but not limited to whether: “(1) the debtor has only one asset; (2) the debtor has an
12 ongoing business to reorganize; (3) there are any unsecured creditors; (4) the debtor has any cash
13 flow or sources of income to sustain a plan of reorganization or to make adequate protection
14 payments; and (5) the case is essentially a two-party dispute capable of prompt adjudication in
15 state court.” In re St. Paul Self Storage Ltd. P’ship, 185 B.R. 580, 582-83 (9th Cir. BAP 1995).

16 In this instance, there is no dispute that the Debtor’s petition was filed in bad faith for
17 wholly tactical reasons. The Debtor’s September 14 petition date was carefully timed so that the
18 Receiver and Secured Creditor would be unable to complete the sale of the Property, and Secured
19 Creditor would be unable to obtain dismissal of the case, before the Sale Order’s September 19
20 closing deadline expired. This bankruptcy filing is an abuse of the system designed to undo months
21 of work by the court-appointed Receiver and his professionals under the supervision of the State
22 Court.

23 The Debtor and Mr. Tashjian had every opportunity to participate in the receivership
24 proceedings in State Court, and filed the bankruptcy petition in an effort to collaterally attack the
25 Sale Order. Simply put, the filing of this case was gamesmanship – a litigation tactic to deter and
26 harass Secured Creditor and the Receiver.

27 As further evidence of bad faith, all of the St. Paul Self Storage bad faith factors are present
28 here:

1 (i) The Debtor has only one asset. By the Debtor's admission, this case is a Single
2 Asset Real Estate. The Property and all related personal property are collateral for Secured
3 Creditor's loan.

4 (ii) The Debtor does not have an ongoing business to reorganize. As detailed in the
5 Receiver Application (RJN, **Exhibit 1** at pp. 4-7), the Debtor was unable to operate the Property
6 as a profitable venture, sell the Property, or otherwise service its monthly loan obligations,
7 allowing impermissible liens to attach to Secured Creditor's collateral. The Debtor's bankruptcy
8 filing is purely an effort to stymie the court-approved sale of the Property at the thirteenth hour.

9 (iii) There are few unsecured creditors. While no schedules have been filed, the creditor
10 matrix lists only seven entities, including Secured Creditor. It is unknown how many on the matrix
11 are actually creditors or were only listed for notice purposes. Notably, the Debtor's list of 20
12 largest unsecured creditors lists "NONE." See Doc. #1 at p. 6. Nonetheless, there is no indication
13 that this case was filed to address any unsecured debt the Debtor may have. Rather, it was filed
14 merely to thwart months of work by the Receiver under the supervision of the State Court.

15 (iv) The Debtor is unable to sustain a plan of reorganization or make adequate
16 protection payments. The \$41 million loan is fully mature and accruing default rate interest, fees,
17 costs and expenses. There is no way that the Debtor is capable of sustaining a plan of
18 reorganization or making adequate protection payments to Secured Creditor. Indeed, Secured
19 Creditor and/or its predecessor has had to advance all operating expenses for the Property, as well
20 as all fees and expenses of the Receiver, since the Receiver was appointed. The Debtor, in contrast,
21 was unable to pay for even the property insurance bill.

22 (v) This case is a two-party dispute capable of prompt resolution in state court. This
23 case is dispute between the Debtor and Secured Creditor. Secured Creditor is the Debtor's senior
24 secured creditor with a lien encumbering the Property and related personal property. The State
25 Court was addressing this dispute more than adequately through the Receivership Action. This
26 case should be dismissed so that the sale may be completed and the Receivership Action resolved.

27 The tactical timing of the Debtor's bankruptcy filing, combined with fulfillment of all of
28 the other indicia of bad faith set forth above, establish that the Debtor's petition was filed in bad

1 faith. Accordingly, the Court should dismiss this case for cause. Moreover, in order to prevent
2 the Debtor and Mr. Tashjian from engaging in this conduct a second time (once the Receiver and
3 Secured Creditor are able to get the sale of the Property back on track), the Court should enter a
4 180-day bar to the Debtor filing another bankruptcy petition. See In re Craighead, 377 B.R. 648,
5 657 (Bankr. N.D. Cal. 2007) (“[S]ection 349 gives the bankruptcy court authority to dismiss a
6 bankruptcy case with a bar preventing the debtor from refiling in cases of abuse.”); In re Pertuset,
7 492 B.R. 232, 258-59 (Bankr. S.D. Ohio 2012) (“A court may dismiss a bankruptcy case with
8 prejudice to refiling, pursuant to Sections 105(a) and 349(a)”);

9
10 **B. The Court Should Enter an Order under Section 543(d) Authorizing the**
11 **Receiver to Remain in Custody and Control of the Property and All Related**
12 **Personal Property, and Excusing the Receiver from the Requirements of**
13 **Section 543.**

14 If the Court does not immediately dismiss this case, Secured Creditor respectfully requests
15 that the Court enter an order under section 543(d) (i) authorizing the Receiver to remain in custody
16 and control of the Property and related personal property of the receivership estate, and otherwise
17 retain all powers and duties set forth in the Receivership Order; and (ii) excusing the Receiver from
18 the complying with the requirements of section 543 of the Bankruptcy Code.

19 Generally, following commencement of a bankruptcy case, a “custodian,” including a
20 receiver,⁶ is required to turn over all property of the debtor within the custodian’s custody and
21 control to the trustee or debtor in possession, and is prohibited from taking any action in
22 administration of this property except as necessary to preserve the property. See 11 U.S.C. §
23 543(a)-(b); In re Uno Broadcasting Corp., 167 B.R. 189, 200 (Bankr. D. Ariz. 1994). Section
24 543(d)(1), however, authorizes a bankruptcy court, in its discretion, to excuse a receiver or other
25 custodian’s compliance with these requirements “if the interests of creditors and, if the debtor is
26 not insolvent, of equity security holders would be better served by permitting a custodian to
27 continue in possession, custody, or control of such property[.]”

28 ⁶ The Bankruptcy Code defines the term “custodian” to include a “receiver or trustee of any of the property of the
debtor, appointed in a case or proceeding not under this title.” 11 U.S.C. § 101(11)(A).

1 Section 543(d) is “intended to provide flexibility when there is no useful purpose to be
2 served by turnover[.]” In re Plantation Inn Partners, 142 B.R. 561, 564 (Bankr. S.D. Ga. 1992).
3 The central inquiry under section 543(d) is whether requiring a receiver to turn over the property
4 in its possession is in the interests of creditors.

5 In determining whether to excuse a custodian’s compliance with the requirements of section
6 543 (collectively referred to hereafter as “turnover”), courts consider a number of factors,
7 including: (1) the likelihood of a reorganization; (2) the probability that funds required for
8 reorganization will be available; (3) whether there are instances of mismanagement by the debtor;
9 (4) whether turnover would be injurious to creditors; and (5) whether the debtor will use the turned
10 over property for the benefit of its creditors. See, e.g., Dill v. Dime Sav. Bank, FSB (In re Dill),
11 163 B.R. 221, 226-27 (E.D.N.Y. 1994) (receiver allowed to stay in possession of properties where
12 lender had to advance funds required to maintain real property and debtor had mismanaged
13 property); In re Packard Square LLC, 575 B.R. 768, 781-82 (Bankr. E.D. Mich. 2017) (receiver
14 kept in place where debtor had no money available to use to do any work towards completing
15 project on subject property or to fund its chapter 11 case); In re Picacho Hills Util. Co., Inc., No.
16 2013 Bankr. LEXIS 1733 at *19-24 (Bankr. D.N.M. Apr. 26, 2013) (excusing receiver from
17 turnover where turnover would prevent receiver from completing pending sale of property); In re
18 Orchard Hill. Invs., LLC, 405 B.R. 341, 353 (Bankr. D. Or. 2009) (receiver excused from turnover
19 where, inter alia, debtor defaulted on subject loan and failed to cure any defaults); In re In re Poplar
20 Springs Apts. Ltd., 103 B.R. 146, 150 (Bankr. S.D. Ohio 1989) (custodian left in custody of
21 apartment building where interests of creditors best served by excusing receiver from turnover).

22 When deciding whether to preserve the status quo and leave a receiver in place, a
23 bankruptcy court must examine the interests of all secured and unsecured creditors. See State Street
24 Bank & Trust Co. v. Park (In re Si Yeon Park Ltd.), 198 B.R. 956, 964 (Bankr. C.D. Cal. 1996).
25 However, where the vast majority of a debtor’s debts are owed to one party, that party’s interests
26 are given great weight. See Poplar Springs, 103 B.R. at 150 (“Although the interest of unsecured
27 creditors must be protected, the overwhelming amount of these debtors’ obligations are to [secured
28

1 lender]. Therefore, it is primarily [secured lender's] interests which must be balanced against the
2 debtors' rights.”).

3 Furthermore, in cases where the custodian is a receiver appointed by a state court prior to
4 the bankruptcy, “bankruptcy courts have considered the length of the time that the receiver has
5 acted under a receivership order, and what, if anything, the receiver has done, and the impact of
6 these considerations on the other relevant factors.” In re Skymark Props. II, LLC, 597 B.R. 391,
7 398 (Bankr. E.D. Mich. 2019); see also Orchards Vill. Invs., 405 B.R. at 353 (excusing a state court
8 receiver from turnover where receivership had been in place for approximately six months prior to
9 bankruptcy filing and had substantially improved the conditions causing receiver's appointment).

10 Notably, the interests of a debtor are not taken into account when evaluating a motion under
11 section 543(d)(1). See Dill, 163 B.R. at 225; see also Collier on Bankruptcy P 543.05 (Alan N.
12 Resnick & Henry J. Sommer eds., 16th ed.) (“[S]ection 543(d)(1) omits consideration of the
13 interests of the debtor.”).

14 In this instance, more than adequate grounds exist to excuse the Receiver from turnover.

15 1. No Reorganization is Reasonably in Prospect.

16 There is little doubt that the Debtor will be unable to generate sufficient income for a
17 successful reorganization in this case. The Debtor has not made any payments on the \$41 million
18 loan since before February 2021, and the entire loan is due and payable, together with accruing
19 default rate interest, fees, costs and expenses. Moreover, all rents and other income derived from
20 the Property constitute Secured Creditor's cash collateral, and Secured Creditor does not consent
21 to the use or expenditure of its cash collateral by the Debtor.

22 Even if the Property were turned over to the Debtor, there is no way it could provide
23 adequate protection to Secured Creditor. The Debtor's multiple monetary and nonmonetary
24 defaults, combined with its inability to sell or generate income from the Property, led to the
25 Receiver's appointment in the first place. Nothing about the Debtor's inability to perform has
26 changed since then. Indeed, Secured Creditor and/or its predecessor has had to advance all funds
27 needed to fund the Property's operations and the Receiver's fees and expenses since the Receiver's
28

1 appointment. There is no reorganization reasonably in prospect, and the Court should excuse the
2 Receiver from turnover.

3 2. It Is in the Best Interests of Creditors to Excuse the Receiver from Turnover.

4 Preserving the status quo and excusing the Receiver from turnover is in the best interests of
5 creditors. This case is a two-party dispute, and was filed as a last ditch stalling effort to prevent the
6 sale of the Property from closing. The Debtor is unable to manage its finances, service the loan,
7 manage the Property, or sell the Property – again, all factors that led to the Receiver’s appointment
8 back in April 2021. During the Debtor’s tenure in control of the Property, it succeeded at nothing
9 other than collecting multiple, ongoing defaults under the loan and accruing default interest, fees,
10 costs and expenses. With this track record, creditors – including, in particular, Secured Creditor –
11 are not well-served by having the keys handed back to the Debtor. The Debtor has no business
12 operating the Property.

13 In contrast to the Debtor’s woeful mismanagement of the Property and its financial affairs,
14 for nearly five months the Receiver has dutifully managed, maintained and operated the Property
15 while actively marketing the Property for sale. See Singer Decl. The Receiver’s months of hard
16 work resulted in a court-approved sale of the Property to Secured Creditor as the highest bid.

17 The Court should excuse the Receiver from turnover so that the financial stability and
18 accountability the Receiver achieved are not thrown away, and – just as importantly – so that the
19 Debtor’s bad conduct in filing this case is not rewarded. For all the foregoing reasons, it is in the
20 best interests of creditors to excuse turnover and keep the Receiver in place.

21 **IV. CONCLUSION**

22 The Debtor’s manager lacked authority to file a bankruptcy petition for the Debtor. To
23 make matters worse, the Debtor’s bankruptcy petition was a bad faith filing purposefully designed
24 to derail the Receiver’s court-approved sale of the Property – the culmination of months of diligent
25 work by the Receiver, his professionals, and the State Court. For all these reasons, the Court
26 should enter an order dismissing this chapter 11 case for cause with a 180-day bar to refiling. If,
27 however, the Court does not immediately dismiss this case, then it should enter an order under
28 section 543(d) (i) excusing the Receiver from complying with the requirements of 11 U.S.C. § 543,

1 and (ii) authorizing the Receiver to remain in custody and control of the Property and all related
2 personal property, and otherwise retain all powers and duties set forth in the Receivership Order.

3 Dated: September 21, 2021

DUANE MORRIS LLP

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5 By: /s/ Geoffrey A. Heaton (206990)

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